IN THE

Supreme Court of the United States

No. 70-5055

RAYMOND SMITH and MELVIN McCLAIN,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

PHILLIP A. HUBBART
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12 Street
Miami, Florida 33125
Attorney for Petitioners

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OPINION BELOW

The opinion of The Supreme Court of Florida is reported at 239 So. 2d 250 (App. 42-44).

JURISDICTION

The judgment and opinion of The Supreme Court of Florida was entered on September 16, 1970. This petition for a writ of certiorari is timely filed within 90 days of that

date. This Court's jurisdiction is invoked under *28 U.S.C. Sec. 1257(3).*

QUESTION PRESENTED

Is *Fla. Stat. 856.02*, which denounces and punishes as "vagrants" all "persons wandering or strolling around from place to place without any lawful purpose or object," a vague and overbroad criminal statute which fails to proscribe an ascertainable standard of criminal conduct thereby violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATUTE INVOLVED

Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965) provides as follows:

> "856.02 Vagrants.
>
> Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, *persons wandering or strolling around from place to place without any lawful purpose or object*, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of

eighteen years who are without means of support and remain in idleness, *shall be deemed vagrants, and upon conviction shall be subject to the penalty provided in Sec. 856.03.*" (Emphasis added.)

STATEMENT OF THE CASE

On November 25, 1968; the Petitioners were charged in a two-count information filed in the Criminal Court of Record in and for Dade County, Florida (App. 24). Count I of the Information charged the Petitioners as follows:

> "IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA: ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that RAYMOND SMITH, MELVIN McCLAIN, and JOHNNY L. BAKER on the 13th day of November, 1968, in the County and State aforesaid, were then and there vagrants by wandering and strolling around from place to place without any lawful purpose or object, in violation of 856.02 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (App. 24.)

On December 5, 1968, the Petitioners entered a plea of not guilty and waived trial by jury (App. 28).

On December 18, 1968, the cause came on for trial before the Honorable Jack M. Turner, Judge of the Criminal Court of Record in and for Dade County, Florida (App. 1). Prior to the time the witnesses were sworn, Petitioners' counsel was permitted by the trial court to make an oral motion to dismiss count I of the information, to wit:

> "MRS. SCHWARTZ: Raymond Smith and Melvin Graham McClain.
>
> MR. HUBBART: Your Honor, at this time I would like permission to dictate a motion to dismiss into the record with respect to Count I.

THE COURT: All right.

MR. HUBBART: Comes now the defendants, Raymond Smith and Melvin Graham McClain, and respectfully moves this Honorable Court to dismiss Count I of the Information filed in this case on the ground that Fla. Stat. 856.02 is void for vagueness under the Fourteenth Amendment to the United States Constitution; particularly that section of Florida Statute 856.02, which proscribes, "wandering and strolling around from place to place without a lawful object."

That particular section of the statute I maintain is a violation of the Due Process Clause of the Fourteenth Amendment because it is void for vagueness; it has no ascertainable standard of guilt stated therein, and under the United States Supreme Court decision of Lanzetta v. New Jersey, any state criminal statute which fails to state an ascertainable standard of criminal guilt in a criminal statute is void for vagueness and is unconstitutional.

Accordingly, the Count, Count I, which is based on that particular section of the statutes, we submit should be dismissed in this cause.

THE COURT: All right. I will deny the motion. I find that the statute is crystal clear.

All right, let's swear the witnesses." (App. 3.)

On December 24, 1968, Judge Turner entered a written order, nunc pro tunc, denying the Petitioners' oral motion to dismiss, to wit:

"THIS CAUSE, having come on for a hearing on the defendants' oral motion to dismiss Count I of the Information filed in this cause, and the Court having heard legal arguments from the parties and being fully advised on the premises, and the Court having previously ruled orally in open Court that said motion to dismiss is denied and the Court desiring to incorporate said oral ruling into a written Order, the Court finds that Fla. Stat. 856.02, upon which

the Information in Count I in this cause is predicated, is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that defendants' oral motion to dismiss Count I of the Information is hereby denied nunc pro tunc." (App. 35.)

On December 18, 1968, the cause proceeded to trial and the Petitioners were found guilty as charged in count I of the information (App. 20). On December 18, 1968, the trial court sentenced the Petitioners on Count I of the Information to 36 days in the County Jail (App. 31).

On December 26, 1968, the Petitioners filed a written motion for new trial again attacking the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), on the ground that it was void for vagueness and overbroadness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. 37-38).

On December 24, 1968, the trial court entered a written order denying the motion for new trial, which order states as follows:

"THIS CAUSE, having come on for a hearing on the defendants' motion for a new trial and the Court having heard legal argument from the parties in this cause, and the Court being fully advised on the premises,

the Court finds that Fla. Stat. 856.02, upon which the defendants were prosecuted on Count I of the Information filed in this cause, is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED AND ADJUDGED that the defendants' motion for a new trial is hereby denied." (App. 36.)

On January 14, 1969, the Petitioners filed a notice of appeal to review their convictions in the Supreme Court of Florida (App. 39). On March 4, 1969, the Petitioners filed assignments of error on appeal which were relied upon before the Supreme Court of Florida (App. 40-41). In the assignments of error, the Petitioners again attacked the constitutionality of the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1956) as being unconstitutionally void on its face for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. 40-41).

On September 16, 1970, the Supreme Court of Florida in a split decision (5-2) affirmed the Petitioners' convictions and specifically upheld the constitutional validity of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965). *Smith v. State*, 239 So. 2d 250 (Fla. 1970) (App. 42-43). Justices Boyd and Drew dissented finding the statute too vague and broad to withstand constitutional tests (App. 44).

On December 14, 1970, the Petitioners filed a Petition for a Writ of Certiorari under *28 U.S.C. Sec. 1257(3)* to review the decision of the Supreme Court of Florida. On June 14, 1971, this Court granted certiorari. *Smith v. Florida*, 91 S. Ct. 2234 (1971) (App. 45). Also Petitioners' motions to proceed in forma pauperis were granted.

SUMMARY OF ARGUMENT

I. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida Courts, punishes as "vagrants" all "persons wandering or strolling around from place to place" (i.e., by any mode of travel whether on foot or in a vehicle, *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966), but having no application to persons sitting on bus benches, *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from *Johnson v. Florida*, 391 U.S. 596 (1968)), "without any lawful purpose or object" (i.e., "without good or sufficient reason," *Hanks v.*

State, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966)), providing such persons "are vagrants of their own volition and choice," *Headley v. Selkowitz*, 171 So. 2d 268, 270 (Fla. 1965). The statute has withstood constitutional attack in the Florida courts as being derived from " 'the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of ablebodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.' " *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (App. 43).

The statute is "distinctly Elizabethan" and "seems to have been selected at random from the Statute of Elizabeth as it was enacted in 1597-98." Sherry, "Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision," *48 Cal. L. Rev.* 557, 560 (1960). It is based on a long line of rather barbaric English vagrancy acts which constituted some of the most oppressive pieces of class legislation ever enacted by the English Parliament. *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Douglas, J. dissenting).

This Court has consistently held that in reviewing the constitutionality of a state statute it is bound by the state courts' construction of the statute. *Winters v. New York*, 333 U.S. 507, 514 (1948); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933).

II. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida courts, is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution for the following two reasons:

A. The statute is designedly so vague that a person of common intelligence cannot know what is forbidden, thereby inviting arbitrary and discriminatory enforcement of the statute by state authorities. "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates

the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Such a vague criminal statute is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution regardless of the details of the offense charged. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The statute under review is a purposely open-ended catch-all which does not prohibit overt acts of criminal conduct, but instead prohibits a vaguely described activity or way of life which is thought to lead to crime. The Supreme Court of Florida stated in the decision below that the statute was designed "'to deter vagabondage and prevent crime. . . .'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (App. 43). The Attorney General of Florida also so states. Response to Petition for Writ of Certiorari to the Supreme Court of Florida 6-7.

The statutory terms "without any lawful purpose or object," as construed to mean "without good or sufficient reason" are most vague and indefinite for the following reasons: (1) What may be a "good or sufficient reason" for traveling to one person may not appear so to another; (2) The statute gives no notice as to whether aimless "wandering or strolling" is "without good or sufficient reason." If so, many of Florida's tourists who wander or stroll aimlessly on the beaches and resort areas are subject to arrest. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); (3) The statute gives no notice as to whether a person is bound to give a "good or sufficient reason" for his wandering or strolling if stopped by an inquiring police officer; (4) The statute gives no notice as to whether the police officer (or indeed who, if anyone) must be satisfied that the reason given for traveling is "good or sufficient."

Vagrancy laws are purposely designed to be vague and indefinite so that the police may arrest persons who are "undesirable" but have committed no overt criminal act. *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frank-

furter, J. dissenting). Such vagrancy-type laws have been held void for vagueness in this Court. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S. Ct. 1686 (1971). Other vagrancy laws, many quite similar to Florida's act, have been similarly held unconstitutional by other Courts. Cf. *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968). These laws must be distinguished from laws using relatively imprecise language dealing with a rather limited range of activity, particularly in the industrial and economic regulation area. E.g., *Boyce Motor Lines Inc. v. United States*, 342 U.S. 337 (1952); *United States v. National Dairy Products*, 372 U.S. 29 (1963). Moreover, the Florida Act, unlike other legislation which has been upheld, does not even purport to deal with problems in modern life.

Since the statute is so vague, it invites arbitrary and discriminatory enforcement of its provisions by state authorities. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931). It is for this reason that vague criminal laws have long been condemned by this Court. E.g., *Herndon v. Lowry*, 301 U.S. 242, 263 (1937); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

B. The statute is designedly so broad that it abridges rights protected by the United States Constitution, to wit: the right to be free from unreasonable searches and seizures and the right to travel. Such laws are unconstitutional on their face regardless of the details of the offense charged. E.g., *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S. Ct. 1686 (1971).

1. The right to be free from unreasonable searches and seizures is guaranteed against invasion by state authorities by the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). Unreasonable arrests and seizures of the person based on mere suspicion

are forbidden by these constitutional guarantees. E.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Henry v. United States*, 361 U.S. 98 (1959). Yet the statute in question not only authorizes such arrests and seizures, but is designed to do so. *Winters v. New York*, 333 U.S. 507, 540 (Frankfurter, J. dissenting); *Ricks v. District of Columbia*, 414 F.2d 1097, 1108-1109 (D.C. Cir. 1968). As such, the statute overreaches this federally guaranteed constitutional right.

2. The right to travel is an implicit part of the freedom guaranteed by the Constitution to all persons. *United States v. Guest*, 383 U.S. 745, 757 (1966) and cases collected. The statute overreaches this right by prohibiting all travel "without good or sufficient reason." These broad and sweeping restrictions "certainly chill the liberty of lawful movement," *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969), by subjecting it to a vague and uncertain standard.

ARGUMENT

I. The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as Construed by the Florida Courts, Punishes as "Vagrants" All "Persons Wandering or Strolling Around from Place to Place" (i.e., by Any Mode of Travel Whether on Foot or in a Vehicle, But Having No Application to Persons Sitting on a Bus Bench), "Without Any Lawful Purpose or Object" (i.e., "Without Good or Sufficient Reason"), Providing Such Persons "Are Vagrants of Their Own Volition and Choice"; the Statute Has Withstood Constitutional Attack in the Florida Courts as Being Derived from "'the Genre of Vagrancy Laws Which Have Long Been Upheld as Necessary Regulations To Deter Vagabondage and Prevent Crimes and the Imposition upon Society of Able Bodied Irresponsibles Who of Their Own Volition Become Burdens upon Others and Particularly on Their Families for Support.'"

In the instant case, the Petitioners were charged by information in the Criminal Court of Record in and for Dade County, Florida, with violating the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), which provides that all "persons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed vagrants . . .," the punishment for which is provided in *Fla. Stat. Sec. 856.03, 22A F.S.A. Sec. 856.03* (1965), as a fine not exceeding $250.00 or imprisonment not exceeding six (6) months.

The Petitioners attacked the constitutionality of the wanderer section of the Florida vagrancy act by way of a motion to dismiss the information, a motion for new trial, and in assignments of error in the courts below. Specifically, Petitioners contended that the statute upon which the charge was based was unconstitutionally void

for vagueness and overbroadness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Judge Jack Turner of the Criminal Court of Record in and for Dade County, Florida, denied Petitioners motion to dismiss the information, found the Petitioners guilty as charged, sentenced the Petitioners to time already served in jail, and denied Petitioners' motion for new trial. Judge Turner announced in open court that the statute in question was "crystal clear" (App. 3). Later, Judge Turner entered two written orders specifically finding that the statute under review was constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of Florida affirmed the conviction in a split (5-2) decision and specifically upheld the constitutionality of the statute, *Smith v. State*, 239 So. 2d 250 (1970). This Court has granted certiorari, 91 S. Ct. 2234 (1971), on the sole question of whether the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is unconstitutionally void on its face for being too vague and overbroad in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court has consistently held that in reviewing the constitutionality of a state statute it is bound by the state courts' construction of the statute. *Winters v. New York*, 333 U.S. 507, 514 (1948); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). Accordingly, the Florida courts' construction of the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) must be examined in determining whether the statute is constitutionally valid.

The Supreme Court of Florida in its opinion rendered in the instant case construed the statute to be derived from common law vagrancy legislation and to fall within its historical purposes. The Court stated:

"The attack here made upon the particular provision of the vagrancy statute alleged to have been violated by the appellants is substantially the same as that made in Johnson v. State, Fla. 1967, 202 So. 2d 852. In that case the court was unanimous in holding that the provision of the statute here in question was not susceptible to the charge of vagueness there made against it. In the well considered concurring opinion filed by Chief Justice Ervin it was stated that *our statute*

"'. . . *appears to be of the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.*'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970). (Emphasis added.)

In *Johnson v. State*, 202 So. 2d 852 (Fla. 1967) (Ervin, J. agreeing in part and dissenting in part), cited with approval above by the Supreme Court of Florida, it was further stated:

"Our statute (Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856 (1965)), which was derived from the early English law, refers to two main categories of vagrants, viz., (1) able bodied beggars, common gamblers, drunkards, railers and brawlers, thieves, pilferers, traders in stolen property, lewd persons and keepers of gambling places, who are denounced as such regardless of their financial status, and (2) able bodied persons who are habitual idlers, loafers, 'hoboes', who neglect their lawful business, if any, stroll and wander from place to place without lawful purpose or object and who are without means of support or reasonably continuous employment or regular income." *Id.* at 854-855.

Since the Florida Courts have construed *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02*, (1965), to be based on the common law of vagrancy, it is most instructive to survey in context "'the genre of vagrancy laws,'" *Smith v. State*, 239

So. 2d at 251, upon which the Florida statute is based and from which it derives its meaning.

The English vagrancy laws dating back to the fourteenth century are rather barbaric and constitute some of the most oppressive pieces of class legislation ever enacted by the English Parliament. *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Douglas, J. dissenting). The purpose of these laws was to prevent people, who were freed from the feudal estates by the breakdown of the feudal system, from wandering, to keep them in their own parish where they were forced to work, and cared for, if necessary. Those who wandered from place to place were severely punished. Such people were feared and regarded as criminals. *Ledwith v. Roberts* (1937), 1 K.B. 232, 271. "Vagrancy may be regarded to a great extent as forming the criminal aspect of the poor laws . . ." *3 Stephen, History of Criminal Law of England* 266 (1883) (also see pp. 274-275).

The first of the vagrancy statutes was apparently the *Statute of Laborers* (23 Edw. 3; 25 Edw. 3, St. 1) passed in 1349 and 1350. According to Stephen, "first came serfdom, next came the Statute of Laborers which practically confined the laboring population to stated places of abode and requiring them to work at specified rates of pay. Wandering or vagrancy thus became a crime." *3 Stephen, History of Criminal Law of England* 267 (1883). The next vagrancy act was *7 Rich. 2, c. 2* (1383) which prohibited "wandering from place to place," as does *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965).

Punishments for wandering were extremely severe and cruel. *II Henry 7*, c. 2 (1494) provided that the vagrants be placed in the stocks for three days and three nights and fed bread and water. *27 Henry 8*, c. 2 (1535) provided that on the first offense the vagrant be whipped and sent back to the place where he was born or where he last dwelled three years ago, that on the second offense the vagrant would lose part of his right ear, and that on the third offense the vagrant would be executed. The *Slavery*

Act, 1 Edw. 1, c. 3 (1547) provided that vagrants would be made slaves for two years, branded on the shoulder or cheek, wear a ring around their necks, arms and legs, fed bread, water and refuse meat, and compelled to work by beating and chaining. If he escaped while in slavery, the vagrant upon recapture was made a slave for life. If he escaped a second time, he was executed upon recapture.

In 1597, Parliament passed an Act which settled the vagrancy law for some time and served as a model for the Florida Act. The *Act of 39 Eliz.*, c. 4 (1597) denounced as vagrants the following:

> "All persons calling themselves scholars going about begging, all seafaring men pretending losses of their ships and goods at sea; all idle persons going about either begging or using any subtle craft, or unlawful games and plays, or feigning to have knowledge of physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, or such other fantastical imaginations; all fencers, bearwards, common players and minstrels; all jugglers, tinkers, and petty chapman, *all wandering persons and common labourers, able in body and refusing to work for the wages commonly given;* all persons delivered out of goals that beg for their fees or travel begging; all persons that wander abroad begging, pretending losses by fire or otherwise, and all persons pretending themselves to be Egyptians." (Emphasis added).

Punishment for being a vagrant was whipping until bloody, incarceration in a house of correction at his home place until employed or banished. One authority has noted that the Florida vagrancy act is "distinctly Elizabethan" and "seems to have been selected at random from the provisions of the Statute of Elizabeth as it was enacted in 1597-98." *Sherry, "Vagrants, Rouges and Vagabonds—Old Concepts in Need of Revision,"* 48 Cal. L. Rev. 557, 560 (1960).

In 1832, Florida enacted its first vagrancy act punishing "any person wandering or strolling about, able to work, or

otherwise support himself in a respectable way, or leading an idle, immoral or profligate course of life. . . ." *Thompson Digest of the Statute Law of the State of Florida*, 4th Division, Title I, Chapter VII, Sec. 12 (1832). The crime was made punishable by the jury at 12 months imprisonment and a $500.00 fine, or 12 months of slavery to the highest bidder, or whipping not to exceed 39 stripes. Minor changes were made in the statute in 1869 and 1905. *Bush, Digest of the Statute Law of Florida, 1872*, Ch. XLVIII, Sec. 24; *Laws of Florida, 1905*, Ch. 5419, Sec. 1. In 1907, the statute under review was enacted and remains in force today. *Laws of Florida, 1907*, Ch. 5720, Sec. 1.

In *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965), the Supreme Court of Florida held that all vagrancy statutes and ordinances in the State should be "applied cautiously and sparingly and only in the most obvious and aggravated cases. Persons should not be charged with vagrancy unless it is clear that they are vagrants of their own volition and choice." Id. at 370.

In *Hanks v. State*, 195 So. 2d 49 (3d D.C.A. Fla. 1966), the District Court of Appeal of Florida, Third District, construed the *Wanderer Section* of *Fla. Stat. Sec. 856.02, 12A F.S.A. Sec. 856.02* (1965), as follows:

> "'(P)ersons wandering or strolling around from place to place without any lawful purpose or object' are deemed vagrants under Sec. 856.02, Fla. Stat., F.S.A.
>
> Phrases similar to 'lawful purpose or object' used in vagrancy statutes have been construed to refer to the reason why such person is wandering or strolling from place to place and is not concerned with his mode of making a living. *Thus, the offense is complete if, without good or sufficient reason, one wanders or strolls from place to place.*
>
> * * * * *
>
> The defendant submits that he was not wandering or strolling from place to place, nor was he on foot at all, but in an automobile.

> *The mode of travel is not material.* Nor do we find merit in the contention that the defendant was not wandering because he had already stopped his vehicle and was parked when questioned by the police." Id. at 50-51. (Emphasis added).

In *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from this Court in *Johnson v. Florida*, 391 U.S. 596 (1968), the Supreme Court of Florida held that the wanderer-section of the statute under review did not apply to a person sitting on a bus bench, that this was not "wandering or strolling."

In summary, it is clear that the *Wanderer Section* of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), as construed by the Florida Courts, punishes as "vagrants" all "persons wandering or strolling around from place to place" (i.e. by any mode of travel whether on foot or in a vehicle, *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966), but having no application to persons sitting on a bus bench, *Johnson v. State*, 216 So. 2d 7 (Fla. 1968), on remand from *Johnson v. Florida*, 391 U.S. 596 (1968)), "without any lawful purpose or object" (i.e. "without good or sufficient reason," *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. 1966)), providing such "persons are vagrants of their own volition and choice," *Headley v. Selkowitz*, 171 So. 2d 368, 370 (Fla. 1965). The statute has withstood constitutional attack in the court below as being derived from "'the genre of vagrancy laws which have long been upheld as necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.'" *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970).

It now becomes necessary to determine whether the statute as thus construed is constitutional within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

II

THE WANDERER SECTION OF FLA. STAT. SEC. 856.02, 22A F.S.A. SEC. 856.02 (1965), AS CONSTRUED BY THE FLORIDA COURTS, IS UNCONSTITUTIONAL ON ITS FACE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR TWO REASONS:

(A) IT IS DESIGNEDLY SO VAGUE THAT A PERSON OF COMMON INTELLIGENCE CANNOT KNOW WHAT IS FORBIDDEN, THEREBY INVITING ARBITRARY AND DISCRIMINATORY ENFORCEMENT OF THE STATUTE BY STATE AUTHORITIES.

(B) IT IS DESIGNEDLY SO BROAD THAT IT ABRIDGES RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION, TO WIT: THE RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND THE RIGHT TO TRAVEL.

The law is well-settled that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and that such a vague criminal statute is unconstitutional on its face in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution regardless of the details of the offense charged. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Likewise the law is equally well-settled that a penal statute which broadly abridges rights protected by the United States Constitution is similarly unconstitutional on its face

regardless of the details of the offense charged. *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Coates v. City of Cincinnati*, _____ U.S. _____, 91 S.Ct. 1686 (1971).

A. The Wanderer Section of Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965), is so Vague That a Person of Common Intelligence Cannot Know What is Forbidden, Thereby Inviting Arbitrary and Discriminatory Enforcement of the Statute by State Authorities.

The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is a classic example of designed vagueness in a penal statute which invites arbitrary and discriminatory enforcement by the police. It is aimed not at any specific criminal conduct, but at a vaguely defined way of life which is thought to lead to crime. As the Supreme Court of Florida states, the Florida Vagrancy Act, like other vagrancy laws, are "'necessary regulations to deter vagabondage and prevent crimes and the imposition upon society of able-bodied irresponsibles who of their own volition become burdens upon others and particularly on their families for support.'" *Smith v. State*, 239 So. 2d 250, 251 (1970). See also *Johnson v. State*, 202 So. 2d 852-855 (Ervin, J. agreeing in part and dissenting in part). Surely this construction of the statute is a frank concession that the law does not purport to prohibit specific acts of criminal conduct, but instead forbids vaguely defined activity by a class of "undesirables" who may in the future commit crimes.

The statute, as construed by the Florida Courts, prohibits anyone from "wandering or strolling" by any mode of travel "without any lawful purpose or object," *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), which means "without good or sufficient reason." *Hanks v. State*, 195 So. 2d 49, 51 (3d D.C.A. Fla. 1966). A more open-ended penal statute could scarcely be drawn for it clearly authorizes the arrest and conviction of all persons who do not have a

"good or sufficient reason" for traveling. A person of common intelligence is not placed on notice as to what a "good or sufficient reason" for traveling might be. These terms are most vague and subjective for what is a "good or sufficient reason" to one person may not appear so to another. The statute gives no notice as to whether aimless wandering or strolling is "without good or sufficient reason." If so, many of Florida's tourists who wander and stroll aimlessly along the beaches and resort areas of the state are subject to arrest. See *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931).

The statute further gives no notice as to whether a person is bound to give a "good or sufficient reason" for his wandering or strolling when stopped by an inquiring police officer or whether the police officer must be satisfied that the reason given is "good or sufficient." "The circumstances that will invariably give rise to arrest and prosecution are left to the discretion of the individual enforcing officer. Thus the manner of enforcement will always depend on the officer's subjective reactions to the conduct which he observes." *Goldman v. Hecht*, 295 F. Supp. 897, 901-902 (D. Colo. 1969). For these and other reasons courts have held that vagrancy laws employing similar terms are unconstitutionally void on their face. *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969) (Salt Lake City vagrancy ordinance punishing "every person who roams about from place to place without any lawful business"); *Karp v. Collins*, 310 F. Supp. 627 (D. N.J. 1970) (New Jersey Statute punishing "any person . . . who is in this state for an unlawful purpose"); *Ricks v. District of Columbia*, 414 F.2d 1097, 1107 (D.C. Cir. 1968) (District of Columbia vagrancy statute punishing "any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself."). See also *United States v. Margeson*, 259 F. Supp. 256, 268 (E.D. Pa. 1966).

Mr. Justice Boyd in his dissenting opinion in the court below articulated the open-ended vagueness of the statute under review as follows:

> "In our time a large portion of our population retires at an early age and is encouraged to relax in the Florida sunshine. Hundreds of thousands of tourists visit Florida. They should not be required to prove they have a lawful purpose. It would be a contravention of our basic understanding of constitutional rights to jail persons in this state for 'wandering around without having a lawful purpose.' Specifically the requirement that persons who wander around must have a lawful purpose is too vague to notify the public as to what standard of conduct the state requires." *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970) (Boyd, J. dissenting).

"The plain fact of the matter, of course, is that vagrancy legislation (such as *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965)) is not essentially aimed at the prohibition of very specific conduct, in the service of any very specific regulatory objective. It is purposefully made obscure, to serve the function of a catch-all—what Professor Caleb Foote has rightly called 'the garbage pail of the criminal law.'" Amsterdam, "Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like," *3 Crim. L. Bull.* 205, 219 (1967).

The Attorney General of the State of Florida does not essentially disagree with this assessment. With commendable candor, he states that statutes proscribing wandering as does *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) "are regulatory measures enacted to prevent crimes and promote the safety of the community" without which "law enforcement officers will be forced to stand idle, completely immobilized by constitutional restraints" while persons stalk the streets intent upon committing crime. Response to Petition for Writ of Certiorari to The Supreme Court of Florida 6-7. Surely this is a candid admission that the statute is aimed at conduct which falls short of specific criminal acts and

empowers the police to arrest persons on mere suspicion that they intend to commit future crimes. Moreover, the contention that the police are "completely immobilized by constitutional restraints" without vagrancy laws is clearly a gross exaggeration. See *Terry v. Ohio*, 392 U.S. 1 (1968).

Mr. Justice Frankfurter aptly summarized the constitutional vice of such purposely-vague vagrancy-type legislation in *Winters v. New York*, 333 U.S. 507 (1948) (Frankfurter, J. dissenting):

> "Only a word needs to be said regarding Lanzetta v. New Jersey. . . . The case involved a New Jersey statute of the type that seeks to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police or prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided". *Winters v. New York*, 333 U.S. at 540 (Frankfurter, J. dissenting).

In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), this Court held that an open-ended New Jersey "gangster" statute was unconstitutionally void for vagueness on its face. The statute punished any "person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted (of a crime or at least three disorderly person offenses)". The *Wanderer Section* of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is the same type of open-ended penal statute designed to suppress an undesirable class of people. The New Jersey statute was aimed at "gangsters" and the Florida statute is aimed at "vagrants". Both statutes are alleged crime control measures designed to prevent crime prior to any overt criminal acts. As Justice Frankfurter noted in his *Winters*

dissent, this vagrancy type legislation is a classic example of a catch-all criminal statute.

In *Coates v. City of Cincinnati*, _____ U.S. _____, 91 S. Ct. 1686 (1971), this Court held an open-ended vagrancy-type ordinance unconstitutionally void for vagueness. The ordinance made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." Like Florida's statute, this ordinance allowed the police to arrest persons who were vaguely undesirable in the eyes of the authorities. The term "annoying" was found by the Court to be too vague, just as the terms "without any lawful purpose or object" (i.e., "without good or sufficient reason") are too vague and open-ended.

In *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969), reversed on other grounds, *Shevin v. Lazarus*, 91 S. Ct. 1218 (1971), the Court held that *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) was unconstitutionally void for vagueness in its entirety. The Court stated:

> "Contrasted with these constitutional principles so basic to freedom is the avowed purposeful indefiniteness of vagrancy statutes. Vagueness is the hallmark of these laws, so that the authorities are not restrained by definite boundaries of the text. This feature allows 'the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution.' Winters v. People, 333 U.S. 507, 540 . . . ." *Lazarus v. Faircloth*, 301 F. Supp. at 272.

In addition, it is in accord with many cases throughout the country which have held vagrancy-type legislation to be too vague to withstand constitutional tests.[1]

[1] E.g., *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968); *Ricks v. United States*, 414 F.2d 1097 (D.C. Cir. 1968); *Alegata v. Commonwealth*, 231 N.E.2d 201 (Mass. 1967); *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967); *City of Seattle v. Drew*, 423 P.2d 522 (Wash. 1967); *Arnold v. City and County of Denver*, 464 P.2d 515 (Colo. 1970); *State v. Grahovac*, 480 P.2d 148 (Hawaii 1971); *State v. Starks*, 9 Crim. L. Rep. 2140 (Wis. May 4, 1971);

The Supreme Court of Florida in its decision in the instant case declined to follow *Lazarus v. Faircloth*, 301 F.Supp. 266 (S.D. Fla. 1969). *Smith v. State*, 239 So.2d 250, 251 (Fla. 1970). Although this Court reversed and remanded *Lazarus* "for reconsideration in light of *Younger v. Harris* . . ," 91 S.Ct. 1218 (1971), it is submitted that the analysis made by the case on the merits is eminently correct.

The Fifth Circuit Court of Appeals in *United States v. Kilgen*, 431 F.2d 627 (5th Cir. 1970), also held that a municipal vagrancy ordinance which tracked *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), was "unconstitutional for vagueness and overbreadth." *Id.* at 631. The Court specifically adopted the authority of *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969).

It is true, of course, that this Court has sustained numerous statutes employing relatively imprecise language against

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Knowlton v. State, 257 A.2d 409 (Me. 1969); *Parker v. Municipal Judge of the City of Las Vegas*, 427 P.2d 642 (Nev. 1967); *Commonwealth v. Carpenter*, 91 N.E.2d 666 (Mass. 1950); *City of Detroit v. Bowden*, 149 N.W.2d 771 (Mich. App. 1967); *City of Cleveland v. Forrest*, 223 N.E.2d 661 (Mun. Ct. Ohio 1967); *In re Newbern*, 350 P.2d 116 (Cal. 1960); *People v. Diaz*, 151 N.E.2d 871 (N.Y. 1958); *People v. Belcastro*, 190 N.E. 301 (Ill. 1934); *City of Akron v. Efflaud*, 174 N.E.2d 285 (Ohio App. 1960); *Soles v. City of Vadalia*, 90 S.E.2d 249 (Ga. App. 1955); *Ex Parte Hudgins*, 103 S.E. 327 (W. Va. 1920); *City of St. Louis v. Gloner*, 109 S.W. 30 (Mo. 1908); *City of St. Louis v. Roche*, 31 S.W. 915 (Mo. 1895); *Ex Parte Mittelstadt*, 297 S.W.2d 153 (Tex. Crim. 1956); *State v. Caez*, 195 A.2d 496 (N.J. Super. 1963); *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931); *Karp v. Collins*, 310 F. Supp. 627 (D. N.J. 1970); *Gordon v. Schiro*, 310 F. Supp. 884 (E.D. La. 1970); *Scott v. District Attorney*, 309 F. Supp. 833 (E.D. La. 1970); *Decker v. Fillis*, 306 F. Supp. 613 (D. Utah 1969); *Kirkwood v. Ellington*, 298 F. Supp. 461 (W.D. Tenn. 1969); *Broughton v. Brewer*, 298 F. Supp. 260 (S.D. N.D. Ala. 1969); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969); *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.C. 1968); *Landrey v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968); *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967); *United States v. Margeson*, 259 F. Supp. 256 (E.D. Pa. 1966). Also see, *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. N.C. 1969), reversed on other grounds, 91 S. Ct. 1219 (1971).

a vagueness attack. None of these statutes however, approach the deliberately vague and open-ended vagrancy legislation now under review. Most of the validating decisions involve industrial or economic regulatory statutes designed to meet specific problems in our modern society with as much specificity as the subject will allow dealing with a rather limited range of activities—i.e., carrying explosives, operating vehicles, selling goods, charging rent.[2] See Amsterdam Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, *3 Crim. L. Bull. 205*, 218-219 (1967). Other validating decisions outside the industrial and economic regulation area have similarly dealt with specific modern problems involving a rather limited range of activities—i.e. taking income tax deductions, trespassing on the property of others, operating noisy sound trucks on the public streets, engaging in criminal group libel, threatening violence against F.C.C. licensees.[3] None of the statutes upheld can be described as open-ended catchalls.

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[2]E.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) ("so far as practicable" drivers carrying explosives shall avoid tunnels, congested places, etc.); *Sproles v. Binford*, 286 U.S. 374 (1932) (exempting from certain motor vehicle restrictions vehicles used only to transport property from a common carrier "by way of the shortest practicable route" to destination); *United States v. National Dairy Products Co.*, 374 U.S. 29 (1963) (selling goods at "unreasonably low prices" for purposes of destroying competition or eliminating a competitor; statute sustained at least as to persons selling below cost); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (providing a defense to an action for rent that the rent charged is "unjust and unreasonable"); *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183 (1936) (sanctioning certain sale contracts of commodities which are "in fair and open competition" with commodities of the same general class).

[3]E.g., *United States v. Ragen*, 314 U.S. 513 (1941) (permitting "a reasonable allowance for salaries or other compensation for personal services actually rendered" as a federal corporate income tax deduction); *Adderly v. Florida*, 385 U.S. 39 (1966) (trespassing "upon property of another, committed with a malicious and mischievous intent"); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (operating sound

In contrast, *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) is a purposely vague catchall. It deals, not with a limited range of activities, but with a vaguely defined way of life. *Smith v. State*, 239 So. 2d 250, 251 (Fla. 1970); *Johnson v. State*, 202 So. 2d 852-855 (Ervin, J. agreeing in part and dissenting in part). It does not even purport to deal with the problems of modern life. Its language "reflects the historic verbiage of vagrancy laws which date back 620 years to the English Statute of Laborers" and is aimed at people and conditions which no longer exist. *Lazarus v. Faircloth*, 301 F. Supp. 266, 271 (S.D. Fla. 1969). Also see *Ledwith v. Roberts*, (1937) 1 K.B. 232, 276-277. Indeed "'a college English major might read it as a casting advertisement in an Elizabethan newspaper for the street scene in a drama of that era'." *United States v. Kilgen*, 431 F.2d 627, 628 (5th Cir. 1970) (describing a city ordinance which tracks *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965)). It is surely "one of the most charming grabbags of criminal prohibitions ever assembled." *Landrey v. Daley*, 280 F. Supp. 968 (N.D. Ill. 1968). As such, it stands quite apart from all of the other statutes which have been upheld against a vagueness attack in this Court.

There is another constitutional objection to the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), that is directly related to its vague and open-ended nature, namely, that it invites arbitrary and discriminary

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trucks, calliopes and other loudspeaker devices on the public streets, when such devices emit "loud and raucous noises"); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (manufacturing, selling, publishing, exhibiting various publications which portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riot . . . ."); *United States v. Petrillo*, 332 U.S. 1 (1947) (using express or implied threats of force, violence, intimidation, duress to coerce an F.C.C. licensee into hiring a person or persons "in excess of the number of employees needed by such licensee to perform actual services").

enforcement by state authorities. This Court has recognized that an over-vague penal statute "licenses the jury to create its own standards in each case." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). It is "susceptible of sweeping and improper application" *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by prosecuting officials against particular groups deemed to merit their displeasure." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). It "lends itself to selective enforcement against unpopular causes," *N.A.A.C.P. v. Button*, 371 U.S. 415, 435 (1963). It "contains an odious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, and their physical appearance is resented by the majority of their fellow citizens." *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S.Ct. 1686, 1689 (1971).

The Court in *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931), accurately described the arbitrary and discriminatory methods by which vagrancy legislation is enforced:

> "It is almost needless to say that such an act cannot be enforced, and no attempt will be made to enforce it, indiscriminately. It may be enforced against those poor hapless ones who are unable to assert or protect their rights, but as to all others it will remain a dead letter. It may be enforced to suppress one class of idlers in order to make a place more attractive to another class of idlers of a more desirable class." *Id.* at 173.

To give law enforcement authorities such dictatorial power over the streets, to leave in their discretion the unfettered authority to determine who is undesirable and subject to arrest, is to take a long step down the totalitarian road. Where a penal statute, as The Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), is designed to be vague and open-ended, it invites "government by the moment-to-moment opinions of a policeman on his beat." *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J.

concurring). It invites arbitrary arrests and convictions for committing essentially innocent acts. *Palmer v. City of Euclid*, ___ U.S. ___, 29 L.Ed.2d 98 (1971) (discharging a passenger from a car late at night); *Johnson v. Florida*, 391 U.S. 596 (1968) (sitting on a bus bench at 2:00 A.M.); *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (playing a guitar in a public park in the afternoons); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (dancing to a jukebox in a cafe). By design, it sets "a net large enough to catch all possible offenders" and leaves courts and juries "to step inside and say who should be rightfully detained and who should be set free." *United States v. Reece*, 92 U.S. 214, 221 (1876). "(T)hat kind of law bears the hallmark of a police state." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1966).

(B) The Wanderer Section of Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02 (1965) Is Designedly So Broad that It Abridges Rights Protected by the United States Constitution, To Wit: The Right To Be Free From Unreasonable Searches and Seizures and The Right To Travel.

There is a second constitutional vice in the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965), namely, it is so broad in its ambit that it abridges certain rights protected by the United States Constitution. Implicit in the foregoing analysis is that this catchall statute permits law enforcement officials to arrest persons on mere suspicion in violation of their right to be free from unreasonable searches and seizures guaranteed against state invasion by the Fourth and Fourteenth Amendments. Indeed this seems to be the main purpose of such laws as Mr. Justice Frankfurter noted in his *Winters* dissent.

Mr. Justice Boyd dissenting in the court below articulated this constitutional objection as follows:

> "Vagrancy statutes have been widely used by police authorities to hold people remotely suspected of

crime while investigations were conducted. Modern interpretations of individual civil rights under state and federal constitutions prohibit this now. If one is engaging in unlawful conduct the state should charge the person with violating a specific law. There is certainly no shortage of criminal laws." *Smith v. State*, 239 So.2d 250 (1970) (Boyd, J. dissenting).

It is widely recognized that a vagrancy charge is "'simply a subterfuge that is used to hold persons for investigation.'" *State v. Alford*, 225 So.2d 582, 585 (2d D.C.A. Fla. 1969). Vagrancy in fact is the crime of arrest and detention on suspicion. *Douglas, "Vagrancy and Arrest on Suspicion"* 70 Yale L.J. 1 (1960). There are two aspects to such arrests. "The alleged vagrant may be suspected of *past criminality*, the arrest for vagrancy offering the opportunity to investigate whether the suspect is wanted in another jurisdiction or has committed other crimes. On the other hand, the suspicion may be of *future criminality*, the inference being that purposeful poverty is likely to lead to other crimes unless the state steps in." *Foote, "Vagrancy–Type Law and Its Administration,"* 104 U. Pa. L. Rev. 603, 625 (1956). Vagrancy laws "appear to be designed to enable the police to arrest persons suspected of having committed or about to commit offenses." *A.L.I. Model Penal Code* (Tent. Draft No. 13, 1961) Comments to Sec. 250.12, Suspicious Loitering. "Vagrancy laws provide authority to hold a suspect for investigation and interrogation when the police could not legally arrest him for another offense." *Task Force Report, The Courts 102* (President's Commission on Law Enforcement and Administration of Justice 1967).

Other authorities have also documented that vagrancy statutes are used as catchalls so that the police may make arrests on mere suspicion and without probable cause. *LaFave, "Detention for Investigation by the Police: An Analysis of Current Practices"* 1962 Washington L.Q. 331; *LaFave, "Penal Code Revision: Considering the Problems and Practices of the Police,"* 45 Tex. L. Rev. 434, 451-452

(1967); *Lacey, "Vagrancy and Other Crimes of Personal Condition,"* 66 Harv. L. Rev. 1203, 1218-1219; *Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 129-130 (1962); *Note, Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950).

The District of Columbia Circuit Court of Appeals in *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968), discussed at length how vagrancy-type laws are openly used by law enforcement officials to sweep the streets of persons who are vaguely undesirable in the eyes of the police although they have committed no overt criminal act. "The record exposes vagrancy enforcement as a device utilized not only to inflict punishment for suspected but unprovable violations in progress but also, through preventive conviction and incarceration, to suppress crime in the future." *Id.* at 1108-1109.

The Fourth Amendment, as applied to the States under the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), prohibits arrests on mere suspicion of past or future criminality, e.g. *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959), *Sibron v. New York*, 392 U.S. 41 (1968). By authorizing and inviting such unreasonable seizures of the person, the Wanderer Section of *Fla. Stat. Sec. 856.02, 22A F.S.A. Sec. 856.02* (1965) clearly overreaches basic Fourth Amendment rights. Indeed, it abridges the very core of Fourth Amendment protection by invading "the security of one's privacy against arbitrary intrusion by the police," *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

In addition, another basic constitutional right is abridged by the statute: the right to travel. "The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the conception of our Federal Union. It has been a right that

has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757 (1966) and cases collected. "The right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law . . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel abroad, like travel within the country . . . may be as close to the heart of the individual as the choice of what he easts, or wears or reads. Freedom of movement is basic to our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 127 (1958), quoted with approval in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964). See also *Edwards v. California*, 314 U.S. 160 (1941).

The Florida Statute in question forbids "wandering or strolling" by any mode of travel "without any lawful purpose or object," which means "without good or sufficient reason." These are broad and sweeping restrictions on the right to travel which "certainly chill the liberty of lawful movement" by covering "any person loitering or even window shopping on the streets." *Decker v. Fillis*, 306 F. Supp. 613, 617 (D. Utah 1969) (Salt Lake City vagrancy ordinance punishing "every person who roams about from place to place without any lawful business"). Florida's greatest industry is tourism—yet the broad ambit of this statute allows the police to determine who are the desirable travelers and who are not. See *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931). The statute clearly overreaches the federally protected right to travel.

CONCLUSION

For the above-stated reasons the judgment of the Supreme Court of Florida should be reversed and the cause remanded with directions to order a discharge of the Petitioners from the cause.

Respectfully submitted,

Phillip A. Hubbart
PHILLIP A. HUBBART
Counsel for Petitioners